

MAJOR ELEMENTS OF THE EPA DBE RULE AND PREAMBLE

STAFF DRAFT OF June 19, 2000

I. Major changes from current requirements for discussion

A. Name Change - The program will be called EPA's DBE program. A DBE is defined as an entity owned and/or controlled by an individual who is socially and economically disadvantaged under either EPA's 8% or 10% statutes, as well as a SBE, a labor surplus area (LSAF) firm or a SBRA. THIS IS NEW.

B. Certification

1. Under the proposal there would be three changes to the current certification requirements in order to satisfy *Adarand's* strict scrutiny analysis.

i. No longer accept MBE self certification.

ii. Recognize MBE certifications (certification of entities as owned and/or controlled by a socially and economically disadvantaged individual under EPA's 8% or 10% statutes by a State, local and Indian Tribal governments and private certifiers so long as their criteria match those under Section 8(a)(5) and (6) of the Small Business Act and SBA's 8(a) Business Development Program regulations. (We currently accept State certifications without their having to adhere to these criteria).

iii. Clarify that EPA will accept DOT DBE certifications as valid certifications under our program.

2. No changes to current WBE certification requirements, i.e. WBEs can continue to self-certify as a WBE.

3. A practical effect if these provisions are adopted is that individuals with a net worth greater than or equal to \$250K would be precluded from initial eligibility and individuals with a net worth greater than or equal to \$750K would be precluded from continued eligibility - this is a major change from our current requirements.

4. EPA will not be certifying any businesses.

C. Good faith efforts - the 6 affirmative steps in 40 CFR Part 31 and the six positive efforts in 40 CFR Part 30 are being combined to be known as good faith efforts. THIS IS NEW.

D. Contract administration provisions -

1. A prime contractor must obtain written approval from the recipient before it could terminate a DBE subcontractor for convenience.

2. When a DBE subcontractor is terminated or fails to complete its work under the subcontract for any reason, the recipient must require the prime contractor to make good faith efforts in hiring another subcontractor (i.e., must undertake the 6 affirmative steps/positive efforts again).

3. A recipient must require its prime contractor to make good faith efforts even if the fair share goals are met.

E. Submission of fair share goals - the rule would require a recipient to submit its proposed fair share goals and supporting documentation to the Agency no later than 90 days after receipt of the assistance award. THIS IS NEW (instead of relying on grant conditions to accomplish a similar result, which is what we have been doing for the past few years). A recipient would not be able to spend any of its financial assistance award for procurement until the fair share goal negotiation process has been completed. Costs of preparing an availability analysis or disparity study may be grant eligible depending on the specific fact situation - THIS IS NEW LANGUAGE FOR THE PREAMBLE ALTHOUGH NOT NEW AS A CONCEPT. EPA approved fair share goals would remain in effect for three fiscal years. If significant changes occur during that time period rendering the data obsolete, the recipient and EPA will renegotiate the goals.

F. Determining fair share goals - The big change from current requirements is that a non-State agency recipient would be able to use a State agency's MBE and WBE fair share goals only if it uses a substantially similar relevant geographic market for its procurement for construction, equipment, services and supplies.

1. In calculating fair share goals, after a recipient comes up with base figures for its MBE and WBE proposed fair share goals through an availability analysis, a

disparity study, using another recipient's goals, or alternative methods, it has to consider whether an adjustment from the base figures is appropriate, based on its past utilization of MBEs and WBEs in contracts under EPA financial assistance agreements, and other relevant information, e.g. disparity studies conducted within a recipient's relevant geographic area, statistical disparities in the ability of MBEs and WBEs to get necessary financing, bonding and insurance.

G. Race and gender conscious efforts - to the extent good faith efforts prove to be inadequate to achieve the fair share goals for MBEs and WBEs, encourage a recipient or prime contractor to take reasonable race and/or gender conscious action to the extent necessary to more closely achieve the fair share goals, including price incentives and technical evaluation credits. Prior notification of the contemplated action to EPA is required.

H. Exemptions - EPA is proposing to exempt recipients of financial assistance agreement totaling \$100K or less in EPA funds for any particular EPA financial assistance project or in any one fiscal year from the fair share negotiations requirements.

I. CWSRF and DWSRF exemptions - EPA is proposing 3 alternative possible exemptions for these programs and is not taking a specific position at this time (THIS IS NEW - THE AGENCY IS SEEKING COMMENT ON THE ALTERNATIVES AND IS NOT PROPOSING ONE OVER THE OTHERS)

1. Exempt identified loan projects with an estimated cost of \$100K from the requirements to apply MBE/WBE fair share objectives. The other rule requirements would apply.

2. Exempt identified loan projects with an estimated cost of \$250K from the requirements to apply MBE/WBE fair share objectives. The other rule requirements would apply.

3. Exempt projects under \$250K from all requirements under the rule except for reporting requirements pertaining to MBE and WBE utilization.

- a. Recipients of identified loan projects would use State negotiated MBE/WBE goals if they used a substantially similar relevant geographic market - if not, they have to negotiate separate MBE/WBE fair share goals with the State based on availability.

J. Insular Areas and Indian Tribes - the rule proposes the same fair share negotiation requirements as for other recipients, with a three year phase in to allow these recipients time to adjust to the change. In the interim, they would have to comply with the rule's other requirements.

K. Definitions - the rule defines a number of new terms, e.g., disparity study and others differently (e.g. MBE) from our current definitions.

L. Waivers - The OSDBU director can grant waivers from any requirements of Part 33 that are not based on a statute or Executive Order.

II. Next Steps

A. 60 day comment period.

B. Possible second internet draft before proposal in the federal register.

Web Sites for Downloading
EPA DBE Rule and Preamble

Mason Tillman Associates, Ltd.
www.mtaltd.com (click on EPA option bar)

EPA
www.epa.gov/osdbu (pending)